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OCTOBER TERM, [redacted] 1970

No. [redacted] 22

MORTIMER NORMAN KORAN,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent.

Petition For Writ of Certiorari To the District Court of Appeal of Florida, Third District

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INDEX TO PETITION

	Page
Opinion Below	2
Grounds For Jurisdiction	2
Question Presented	2
Constitutional, Statutory and Rules Provisions Involved	3-5
Statement of The Case	5-8
How The Federal Question Was Raised	8-9
Reasons For Granting The Writ	9-13
Conclusion	14

INDEX TO APPENDIX

		Page
Appendix A	Information, filed June 6, 1967	1-3
Appendix B	Motion To Suppress, filed June 12, 1967	5
Appendix C	Judgment and Sentence, filed November 30, 1967	7-8
Appendix D	Motion For New Trial, filed June 23, 1967	9-10
Appendix E	Notice of Appeal, filed November 30, 1967	11
Appendix F	Assignment Of Errors, filed December 18, 1967	13-16
Appendix G	Opinion of District Court of Appeal of Florida, Third District, filed August 20, 1968	17-22
Appendix H	Order Denying Petition for Rehearing by District Court of Appeal of Florida, Third District, filed September 24, 1968	23
Appendix I	Order Denying Petition For Writ Of Certiorari by Supreme Court of Florida, filed January 23, 1969	25
Appendix J	Order Denying Petition For Rehearing by Supreme Court of Florida, filed February 27, 1969	27

TABLE OF CASES

	Page
Berger vs. State of New York 388 U.S. 41, 87 S.Ct. 1873 (1967)	11
Desist vs. United States, __ U.S. __ (March 24, 1969)	10, 13
Fuller vs. State of Alaska 393 U.S. 80, (1969)	9
Lee vs. State of Florida 392 U.S. 378, 88 S.Ct. 2096 (1968)	9
Katz vs. United States 389 U.S. 347, 88 S.Ct. 507 (1967)	9, 14
Koran vs. United States of America __ F.2d __ (5th Cir. 1969)	8
Linkletter vs. Walker 381 U.S. 618, 85 S.Ct. 1731 (1965)	12
Miranda vs. State of Arizona 384 U.S. 436, 86 S.Ct. 1602 (1966)	12

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Petitioner prays that a writ of certiorari issue to review the decision and judgment of the District Court of Appeal of Florida, Third District.

OPINION BELOW

The Opinion of the District Court of Appeal of Florida, Third District, affirming Petitioner's conviction, is reported in 213 So.2d 735, (Fla. App. 1968), and may be found in Appendix G.

GROUNDS FOR JURISDICTION

The Sentence and Judgment of conviction of the Criminal Court of Record in and for Dade County, Florida was entered on November 30, 1967. (Appendix C). The Opinion of the District Court of Appeal of Florida, Third District, affirming Petitioner's conviction, was entered on August 20, 1968 (Appendix G). Said Court's Order Denying Petition For Rehearing was entered on September 24, 1968 (Appendix H). The Supreme Court of Florida denied a Petition for Writ of Certiorari on January 23, 1969. (Appendix I), and denied the Petition for Rehearing on February 27, 1969 (Appendix J).

The Jurisdiction of this Court is invoked under 28 U. S. C. 1257 (3), because a title, right, privilege or immunity claimed under the Constitution of the United States was denied by the District Court of Appeal of Florida, Third District.

QUESTION PRESENTED

Though the electronic surveillance of Petitioner occurred prior to the decision in Katz vs. United States on December 18, 1967, does the introduction into evidence of tape recordings of oral and telephone conversations of Petitioner, when Petitioner elects not to testify at his trial, constitute a violation of his rights under both the Fourth and Fifth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensations.

AMENDMENT XIV

SECTION I

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wheren they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF FLORIDA

SECTION 12-DOUBLE JEOPARDY: SELF-INCRIMINATION: EMINENT DOMAIN: RIGHT TO WORK

No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken without just compensation. The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employe-.

SECTION 22-SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches, shall not be violated and no warrants issued, but upon probable cause, supported by oath or affirmation, particularly describing the place or places to be searched and the person or persons, and thing or things to be seized.

TITLE 28

UNITED STATES CODE

SECTION 1257 (3)

Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: By Writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

In June, 1966, Petitioner was a printer engaged in the printing business in Hallandale, Broward County, Florida. A United States Secret Service Agent, while conducting an investigation of counterfeit currency, devised a plan by which he would attempt to entice Petitioner into printing counterfeit currency and Florida drivers' licenses. Pursuant to the agent's plan, an informer was equipped with an electronic eavesdropping device on his person, and was sent to Petitioner's place of business in Hallandale to discuss the above counterfeiting plan. Their conversation was overhead and recorded by the agent who stationed himself nearby but outside Petitioner's premises. (R. 4A-9A).

The next day, at the agent's instructions, the informer telephoned Petitioner, at his place of business. The telephone used was equipped with an electronic eavesdropping device, and the conversation was overhead by the agent and likewise recorded. (R. 8A-11A). The informer arranged a meeting between Petitioner and the agent, who would act in an undercover capacity as a buyer of counterfeit currency and drivers' licenses. The agent, in his undercover capacity and also equipped with an electronic eavesdropping device on his person, met with the informer and Petitioner, and their conversations were overheard and recorded by other police officers stationed nearby, but out of view, who recorded same. (R. 16-23).

During the next few days, the agent initiated several telephone calls to Petitioner at his place of business, and the telephone used by the agent was equipped with an electronic eavesdropping device. These telephone conversations were likewise recorded without Petitioner's knowledge. (R. 31-33). A meeting was arranged during these telephone conversations for the delivery of the counterfeit drivers' licenses from the Petitioner to the agent, and Petitioner was arrested at said meeting. (R. 34, 36).

Petitioner was charged by Information with violation of Florida Statutes 322.212(1) Unlawful Possession of Counterfeit Drivers' Licenses (Appendix A). Prior to the trial, Petitioner filed his Motion To Suppress, which was primarily directed toward (1) the oral conversation between the informer and Petitioner at Petitioner's place of business, (2) the oral conversations between the agent, the informer and Petitioner, not at Petitioner's place of business, and (3) the telephone con-

versations between the informer and the agent, on the one hand, and Petitioner, which calls were made to, not from, Petitioner at his place of business. (R. 167-168). The Trial Court granted the Motion To Suppress with regard to the conversations between the informer and Petitioner, but denied the Motion with regard to all other oral and telephone conversations. (R. 47A, 13-14).

Petitioner was tried by the Criminal Court of Record in and for Dade County, Florida, and during the trial, the prosecution introduced testimony of government agents as to all of the unsuppressed oral and telephone conversations of Petitioner, and in addition, tape recordings of all of said oral and telephone conversations, which were played to the jury over Defendant's objections and renewal of his Motion To Suppress (R. 83-85). These tape recordings were considered to be of such importance to the Jury that they asked that same be played again during their deliberations (R. 155).

Petitioner did not testify, nor was the informer produced as a witness by the prosecution, at either the Hearing on the Motion To Suppress, or at the Trial.

Petitioner was found guilty and sentenced to a term of three years in the State Penitentiary (Appendix C).

From this Judgment and Sentence, Petitioner filed his Notice of Appeal to the District Court of Appeal of Florida, Third District (Appendix E).

As a result of the same surveillance and investigation herein, Petitioner was charged by the United States authorities for various offenses relating to counterfeit

currency. Petitioner was tried and convicted in the United States District Court For The Southern District Of Florida, and the identical tape recordings were admitted into evidence by the Trial Court. The United States Court of Appeals for the Fifth Circuit affirmed the conviction in **Koran vs. United States of America,** —— F. 2d —— (5th Cir. 1969), and a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is being filed in this Court simultaneously with the filing of this Petition. The same question is involved in both cases.

HOW THE FEDERAL QUESTIONS WERE RAISED

Prior to Trial, the federal questions were raised in Petitioner's Motion To Suppress such evidence which was obtained contrary to the Constitutions of the State of Florida and of the United States (Appendix B). The Trial Court granted the Motion with regard to the oral and telephone conversations between the informer and Petitioner, but denied the Motion with regard to all other of Petitioner's oral and telephone conversations. (R. 47A, 13-14).

The federal questions were raised during the trial, when the tape recordings were introduced into evidence and played to the jury over Petitioner's objections and renewal of his Motion To Suppress. (R. 83-85).

The federal questions were raised after the Trial by Petitioner's Motion for New Trial (Appendix D), which was denied by the Trial Court on November 30, 1967 (R. 177).

The federal questions were raised in Petitioner's Assignments of Error filed in the District Court of Appeal of Florida, Third District, (Appendix F), in the Brief of Appellant, and in the Petition For Rehearing in said Court, which was denied on September 24, 1968. (Appendix H).

The federal questions were likewise raised in the Petition for Writ of Certiorari, filed in the Supreme Court of Florida, as well as in the Petition For Rehearing in said Court, which was denied on January 23, 1969 (Appendix I), as well as in the Petition For Rehearing, which was denied on February 27. (Appendix J).

REASONS FOR GRANTING THE WRIT

There is now no question that the Government's electronic activities in the instant case were clearly violative of Petitioner's constitutional rights and also violative of federal statutes.

Petitioner's conviction undoubtedly would have been set aside under the doctrine set forth in **Lee vs. State of Florida,** 392 U.S. 378, 88 S.Ct. 2096 (1968), that such activity was in violation of Section 605 of the Federal Communication Act, but for the prospective application of such rule in **Fuller vs. State of Alaska,** 393 U.S. 80, —— S.Ct. —— (1969).

In addition, Petitioner's conviction also undoubtedly would have been set aside under the doctrine set forth in **Katz vs. United States,** 389 U.S. 347, 88 S.Ct. 507 (1967), that such surveillance was in violation of rights under

the Fourth Amendment, but for this Court's pronouncement in **Desist vs. United States,** —— U.S. —— (March 24, 1969) that **Katz** also "should be accorded only prospective application."

There are, however, major factual differences between the present case and **Desist,** wherein it is submitted the harsh and unjust rules of **Desist** are not applicable because of the Fifth Amendment question.

Desist was not clear as to whether the Defendants therein did or did not testify in their own behalf, other than this Court's pronouncement "an important part of the Government's evidence consisted of tape recordings of conversations among several of the Petitioners in a New York City hotel room." The lower Court, however, indicated that several of the Defendants offered affirmative testimony and evidence, including an alibi, which may well have included direct testimony by the Defendants.

It is Petitioner's contention that the Fifth Amendment demands a Defendant should "not be compelled in any criminal case to be a witness against himself." To give full meaning to the rights created under such Amendment, the illegally seized tape recordings of oral and telephone conversations of Petitioner, which contained many incriminating statements by Petitioner, should not have been introduced into evidence and played to the jury, until and unless Petitioner elected to testify at the trial. In the event Petitioner waived his rights and did elect to testify, the tape recordings could then be introduced into evidence to impeach the testimony of Petitioner.

If the above were not the rule, then Courts are merely giving lip service to a defendant's Fifth Amendment rights, in that the practical effect, as was the case here, would be to permit the jury to actually hear a Defendant's own incriminating statements convict him, when he has not yet had the opportunity to make an intelligent decision whether to make or not to make any statement.

In **Berger vs. State of New York**, 388 U.S. 41, 87 S.Ct. 1873 (1967), Justice Douglas, in his concurring opinion, stated at page 67:

> "The words that a man says consciously on a radio are public property. But I do not see how government using surreptitious methods can put a person on the radio and use his words to convict him. Under our regime, a man stands mute if he chooses, or talks if he chooses. The test is whether he acts voluntarily. That is the essence of the face of privacy protected by the 'mere evidence' rule. For the Fourth Amendment and the Fifth come into play when the accused is 'the unwilling source of the evidence' . . . There being no difference 'whether he be obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers . . .
>
> " . . . in short, I do not see how any electronic surveillance that collects evidence or provides leads to evidence, is or can be constitutional under the Fourth and Fifth Amendments . . ."

This Court has gone to great extreme to extend Constitutional rights of Defendant outside the courtroom by limiting the use of extrajudicial statements made by such Defendant. In **Miranda vs. State of Arizona**, 384 U.S. 436, 86 S.Ct. 1602 (1966), this Court stated at Page 459:

> " . . . All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth . . . In sum, the privilege is fulfilled only when the person is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his own will'."

Further this Court in **Linkletter vs. Walker**, 381 U.S. 618, 85 S.Ct. 1731, (1965), discussed the retrospective application of new criminal rules, and stated at P. 1743:

> " . . . finally in each of the three areas in which we have applied our rule retrospectively, the principle that we applied went to the **fairness of the trial** . . . " (Emphasis Added)

And, in **Desist,** this Court stated the exclusionary rule under the Fourth Amendment is but a "procedural weapon that has no bearing on guilt" and "the fairness of the trial is not under attack."

Petitioner submits that if a defendant elects not to testify, the prosecution has the burden of carrying forward the prosecution without the defendant's own voice and words making up the primary evidence for his conviction. It is respectfully submitted that the "fairness of the trial" is clearly under attack if such a procedure is used.

CONCLUSION

Petitioner respectfully submits that pre-**Katz** law would recognize clearly that the illegally obtained evidence used to convict Petitioner herein constituted a violation of his rights under the Constitution of the State of Florida, and the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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